INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2-5
Specifications of Errors to be Urged	5
Reason for Granting the Writ	6-8
Conclusion	8
Appendix—Title 28, United States Code, Chapter 89, Section 1441 (b)	9
Opinion of Court of Appeals in Deauville Associates, Inc. v. Lojoy Corporation et al	10-12

TABLE OF CASES CITED

Rand v. Walker, 117 U. S. 340	7-8

STATUTE CITED

Title 28, United States Code, Chapter 89, Section 1441 (b)	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

LOJOY CORPORATION, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE FIFTH CIRCUIT.

To The Honorable, the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

Opinions Below

The opinion of the Court of Appeals (R. 49) is reported in 181 F. 2d 5. The District Court entered judgement without rendering an opinion (R. 43, 44, 45).

Jurisdiction

The Court of Appeals for the Fifth Circuit filed its opinion on April 14, 1950 (R. 49). A petition for rehearing was filed on May 10, 1950 (R. 53) and was denied on June 5, 1950 (R. 58). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

Questions Presented

1. Where Petitioner here sought intervention in litigation pending in the Federal District Court to preclude receivers therein appointed from effecting a sale of the lease indenture which was the subject of the litigation and where application for intervention was denied, may the Petitioner here attack the validity of the sale by the receivers in independent litigation?

2. Where lessee interest in lease is purchased from receivers appointed in the Federal District Court in litigation there pending and subsequently suit is instituted in the State Court for a declaratory decree attacking the interests acquired by the purchaser from the Federal Receivers, is such litigation subject to removal from the State Court to the Federal District Court as falling within the category prescribed by Title 28, of the United States Code, Chapter 89, Section 1441 (b)?

Statute Involved

Title 28 of the United States Code, Chapter 89, Section 1441 (b).

Statement

Deauville Associates, Inc., petitioner here, complaint below, filed in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, a complaint seeking a declaratory decree that a lease entered into by the Defendants Bergin and the Lojoy

Corporation be held void and of no effect as to the complainant and that the judicial purchase by the Defendant M. A. Wally of his interest in the lease be declared void as to the Plaintiff. The leasehold property involved is described as follows:

> Lot 32 in Block 7 of Second Ocean Front Subdivision according to the plat thereof recorded in Plat Book 28, at page 28, of the Public Records of Dade County, Florida.

On the 21st day of April, 1949, the Defendants, Lojoy Corporation and E. & B. Corporation filed their petition to remove the said suit from the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, to the District Court of the United States on the claim that the Plaintiff's civil action was filed "on a claim or right arising under the laws of the United States of which this Court has original jurisdiction, said controversy arising from an attack on the validity of the order of sale of the aforesaid 99-year lease and the order confirming said sale entered by this Court in Case No. 1148-M-Civil".

On the 29th day of April, 1949, the Defendants Lojoy Corporation and E. & B. Corporation filed their motion to dismiss the Plaintiff's complaint on May 6, 1949, the Defendants Bergin filed their motion to dismiss the complaint.

On the 9th of May, 1949, the District Judge entered an order finding:

> (a) That the plaintiff's complaint refers to and depends upon the records and proceedings of File No. 1148-M-Civil. (This case is now pending before this Court on a petition for writ of certiorari, the same being No. 165, and styled Deauville Associates, Inc., petitioner, vs. John Murrell and D. H. Redfearn, as Receivers of Deauville Corporation, respondents).
>
> (b) That the complaint is not capable of being amended.

(c) That the plaintiff has no cause of action against the moving defendants.

(d) That the plaintiff is limited to the proceeds of a receiver's sale in file No. 1148-M-Civil, and upon such findings, dismissed plaintiff's complaint with prejudice.

On the 11th day of May, 1949 ,an amended complaint was filed which sought a determination that the only interest in the leasehold property as Lessee was in the plaintiff, and that the defendants had no interest in said leasehold property, and simultaneously with the filing of said amended complaint, plaintiff filed its motion to vacate District Judge's order dismissing plaintiff's complaint as to Lojoy Corporation and E. & B. Corporation and filed its motion to remand said cause to the Circuit Court for the Eleventh Judicial Circuit of Florida.

On the 13th day of May, 1949, the District Judge denied the plaintiff's motion to vacate the order dismissing the complaint as to Lojoy Corporation and E. & B. Corporation, and on the same day dismissed the complaint as to the Defendants, Bergin. From the orders of dismissal and the refusal of the District Judge to remand said cause, the Plaintiff, petitioner herein, prosecuted its appeal to the Court of Appeals for the Fifth Circuit.

On April 14, 1950, the Court of Appeals for the Fifth Circuit entered its opinion, the same being attached hereto and also may be found in R. 49.

Petition for rehearing was filed by petitioner on May 5, 1950 (R. 53), and the same was denied by the Court of Appeals on June 5, 1950 (R. 58).

The within application for writ of certiorari is being prosecuted not only for the errors and reasons herein designated, but for the further reason that the leasehold interest which is the

subject of this litigation was conveyed by the receivers in litigation pending in the District Court for the Southern District of Florida, there designated as Civil action No. 1148-M-Civil styled William M. F. Magraw, John M. Murrell and Preston G. Prevatt, as Administrators of the Estate of Lucy Cotton Thomas, also known as Lucy Cotton Thomas Magraw, also known as Lucy Eristavi-Tchitcherine, deceased, Plaintiffs, vs. John M. Murrell and D. H. Redfearn, as Receivers of Deauville Corporation, et al., Defendants, which litigation was subsequently appealed to the Court of Appeals for the Fifth Circuit and is now pending before this Court on an application for writ of certiorari, the same being here styled Deauville Associates, Inc., petitioner, vs. John M. Murrell and D. H. Redfearn, as receivers of Deauville Corporations, respondents, No. 165. It is necessary that pending a determination of the application and a writ of certiorari in Case No. 165, that the rights of Petitioner under the within application for certiorari be preserved. If the rights of Petitioner under the within application for certiorari are not preserved, Petitioner here may obtain the relief which it seeks in Case No. 165 and the success there would be moot as Petitioner would lose its rights under the within case if both items of litigation are not determined together.

Specifications of Errors to be Urged

The Court of Appeals for the Fifth Circuit erred:

1. In holding that the litigation instituted in the State Court by Petitioner here was a proper subject for removal under Title 28, of the United States Code, Chapter 89, Section 1441 (b).

2. In affirming the orders appealed from entered by the District Court.

Reasons for Granting the Writ

1. As to Question 1: As will be noted in the application for certiorari pending in this Honorable Court in Case No. 165, Petitioner here, as in Case No. 165, has been attempting to obtain its day in court in the District Court for the Southern District of Florida to no avail. The within litigation is a perfect manifestation of the dilemma in which Petitioner finds itself. The Court of Appeals in limiting the right of Petitioner to intervene precluded it from having its day in court by effecting a liquidation of the assets of the litigation. Petitioner here sought to preserve its rights by the suit instituted in the State Court which was subsequently removed to the Federal Court for which review is herein sought. Petitioner can only preserve its rights pending a determination of Case No. 165 by pressing the within application for certiorari. Petitioner has earnestly sought a determination of its rights by first attempting intervention in Case No. 1148-M-Civil, which is now the subject of application for certiorari in Case No. 165 in this Honorable Court. The application for intervention was denied and later upon appeal to the Court of Appeals for the Fifth Circuit it was granted but limited as to a particular date. The asset which Petitioner sought to preserve and have its rights determined in was sold by the receivers prior to the intervention date granted by the Court of Appeals for the Fifth Circuit. Petitioner in order to preserve its rights while the litigation was pending on appeal to the Court of Appeals instituted a suit in the State Court. In short, Petitioner sought in two ways to preserve its rights and obtain a determination of them:

(1) By intervention in the main suit which application for intervention was denied.

(2) By separate litigation which was removed to the Federal District Court and there dismissed.

Petitioner respectfully contends that it was entitled to a determination of its rights and to have its day in court by either of the methods followed. It having been denied its right by intervention, the action of the Federal receivers in effecting petitioner's rights was subject to a determination by separate litigation. The litigation which was removed to the Federal District Court should not have been dismissed, but on the contrary should have been entertained to the end that somewhere Petitioner here would have been afforded its day in court. As above stated, Case No. 165 determining Petitioner's rights to intervene is now pending. As to whether Petitioner should either be permitted to obtain a determination of its rights by separate litigation as the within petition reveals or by intervention makes little difference. At least one avenue of approach should be open. Upon which horn of the dilemma the petitioner's adversaries are impelled makes little difference so long as some avenue of relief is afforded Petitioner.

2. As to Question 2: Title 28 of the United States Code, Chapter 89, Section 1441 (b) provides:

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. * * * *"

The failure of the District Court to remand the cause to the State Court and the Court of Appeals in affirming the action of the District Court was clearly outside the purview of the decision of this Honorable Court. See Rand v. Walker, 117 U. S. 340, which held:

> "After the suit got into the Circuit Court, a supplemental bill was filed by Mrs. Walker in which she alleged that a certain judgment which had been obtained in the Circuit Court of the United States after the removal, in a suit to

which she was not a party, had been obtained by collusion between the parties thereto, and did not conclude her upon certain questions arising under the deed of trust to Brown. This, it is claimed, gave the Circuit Court jurisdiction independent of any question of removal, on the ground that thereafter the suit was one arising under the constitution and laws of the United States within the meaning of the Act of 1875. The effort of Mrs. Walker is not to avoid the judgment as between the parties, but to show that as to her, she not being a party, it has no effect. This raises no question under the authority of the United States."

Conclusion

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

TITLE 28, UNITED STATES CODE
CHAPTER 89 — DISTRICT COURTS
REMOVAL OF CASES FROM STATE COURTS

Section 1441 (b) Actions removal generally.

"Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12862

DEAUVILLE ASSOCIATES, INC.,
Appellant

versus

LOJOY CORPORATION, ET AL.,
Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(April 14, 1950)

Before HUTCHESON, Chief Judge, and WALLER and RUSSELL, Circuit Judges.

HUTCHESON, Chief Judge: The suit attacks a title to property acquired under and resting on an order in cause No. 1148-M-Civil in the United States District Court for the Southern District of Florida, and has for its object the nullifying of that order.

Filed in the Circuit Court in and for Dade County, Florida, on April 13, 1949, nine days after the date fixed by this court[1] for plaintiff's permitted intervention in the court below, it was brought to circumvent and nullify that determination by attempting to relitigate in the state court matters which had been finally determined in the federal court.

On April 21, it was removed to the federal court on the ground that the suit was one arising out of an attack upon the validity of an order of sale issued out of the United States District Court

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1 Deauville Associates, Inc. v. Eristavi-Tchitcherine, et al, 173 F (2) 745.

for the Southern District of Florida, in No. 1148-M-Civil, and, therefore, was a civil action founded on a claim or right arising under the laws of the United States.

On April 29, defendants, appellees here, filed a motion to dismiss the action because the complaint fails to state a claim against the defendant, and the motion coming on for hearing, the same was, on May 9, 1949, granted, and the suit was dismissed with prejudice.

On May 11, 1949, plaintiff filed in the trial court: (1) its motion to remand; and (2) its motion to vacate the order dismissing plaintiff's complaint. It also filed an amended complaint, in which, still attacking the action of the court in No. 1148-M-Civil, as invalid, it prayed that the court enter a declaratory decree determining and defining the respective rights of the parties, plaintiff and defendants, and further determining that the defendants have no interest in and to the property, but the only interest therein is in the plaintiff.

On May 13, these motions, on notice of the hearing, coming on to be heard, the district court entered two orders. One was an order denying the motion to vacate the May 6, 1949, order which had dismissed its original complaint.

The other was an order: reciting the examination by the court of the original record and proceedings in the cause No. 1148-M-Civil, the decree in which was attacked on the complaint; determining, from that examination, that the plaintiff has no cause of action against the moving defendants; and adjudging that the complaint is not capable of being amended, that plaintiff's rights, if any, are limited to its claim upon the proceeds of the receiver's sale in said cause No. 1148-M-Civil, and that the complaint be, and the same is hereby, dismissed with prejudice.

Plaintiff, appealing from the orders of May 6th and May 13, 1949, is here urging: (1) that its suit was not based upon a federal question, and, therefore, it should have been remanded; and (2) that, if the federal court had jurisdiction, it was error to dismiss the bill of complaint because it set forth facts which, if true, stated a cause of action.

We cannot agree with either of these contentions. It is quite clear, upon the authorities,[2] that the suit was founded upon, and raised, a federal question authorizing its removal to the federal court. It is further clear, notwithstanding its reticences, its evasiveness, its complete lack of candor, that the complaint and the amended complaint present nothing more than an effort, in circumvention of the decision and decree of this court, to do by indirection in the state court what it has been denied the right to do by intervention in the federal court. This was to relitigate in the state court matters already determined in the federal court.

It is quite plain that this is just another of the attempts of appellant, persisted in almost to the point of, if not beyond, contumacy, to continue to litigate matters already conclusively determined against its predecessor in title and itself.[3] The judgment appealed from is

AFFIRMED.

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2 South Dakota v. Continental, 255 Fed. 941, and cases cited.

3 Deauville Associates, Inc. v. Eristavi-Tchitcherine, et al, 183 F (2d) 745 note 1, supra; Deauville Associates, Inc. v. John M. Murrell and Redfearn, as Receivers, . . . F (2) . . . (2-27-50).

INDEX

	Page
Statement of the Case	1
Point I—The Denial by this Court of Petitioner's Application for Writ of Certiorari in Case No. 165 (October Term, 1950), is by necessary implication an adjudication adverse to petitioner of the matters asserted by the petitioner in the present application for writ of certiorari	3
Point II—Petitioner's suit in the State Court was founded upon and raised a Federal question authorizing its removal to the Federal Court	6
Conclusion	7

CASES CITED

	Page
Deauville Associates, Inc. vs. Eristavi-Tchitcherine, 173 F. (2nd) 745	3, 4, 5
Deauville Associates, Inc. vs. Murrell, 180 F. (2nd) 275	2, 5
Rand vs. Walker, 117 U. S. 340	6
South Dakota vs. Continental, 255 Fed. 941, certiorari denied 250 U. S. 642, 39 S. Ct. 493	6, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 383

DEAUVILLE ASSOCIATES, INC.,

Petitioner,

vs.

LOJOY CORPORATION, et al.,

Respondents

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The petition for certiorari invokes the jurisdiction of this court under 428 U.S.C. 1254 and sets forth two specifications of error (Pet. 5) to the opinion and order of the Fifth Circuit Court of Appeals (Deauville Associates, Inc. vs. Lojoy Corporation, 181 F. (2nd) 5), affirming the order of the District Court (R. 43, 44, 45).

The Circuit Court of Appeals held:

(1) That the suit filed by the petitioner in the State court, attacking the title to property acquired by the respondent under an order of the United States District Court for the Southern District of Florida, was an attempt to relitigate in the state court matters which had been finally determined in the Federal court, and that the suit was clearly founded upon and raised a federal question authorizing its removal to the federal court (Pet. 10-12).

(2) That the petitioner's complaint and amended complaint presented nothing more than an effort, in circumvention of the decision and decree of the Fifth Circuit Court of Appeals, to do by intervention in the state court, what it had been denied the right to do by intervention in the Federal court, and that the United States District Court, therefore, properly dismissed the petitioner's complaint. (Pet. 12).

In addition to specifying error in these two holdings of the Fifth Circuit Court of Appeals, the petitioner alleges that the present application for writ of certiorari is being presented because the property which is the subject of this litigation was conveyed by receivers in other litigation[1] in which writ of certiorari is being sought in this Court in Case No. 165, alleging that the present application is necessary in order to preserve its rights in the event of a decision favorable to petitioner in Case No. 165 (Pet. 4-5).

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[1] Deauville Associates, Inc. v. Murrell, 180 F. (2nd) 275.

Since the filing of the petition for writ of certiorari in the present case, this court has denied the application for writ of certiorari in Case No. 165 and the time for filing petition for rehearing under Rule 33 has elapsed.

POINT I

THE DENIAL BY THIS COURT OF PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI IN CASE NO. 165 (OCTOBER TERM, 1950), IS BY NECESSARY IMPLICATION AN ADJUDICATION ADVERSE TO PETITIONER OF THE MATTERS ASSERTED BY THE PETITIONER IN THE PRESENT APPLICATION FOR WRIT OF CERTIORARI.

Case No. 165 was an application for writ of certiorari brought by the present petitioner against John M. Murrell and D. H. Redfearn, as Receivers of Deauville Corporation. The application sought technically a review of the decision of the Fifth Circuit Court of Appeals, affirming two orders of the District Court entered on June 28, 1949, one striking petitioner's cross petition, and one authorizing the receiver to attempt a resale of the McFadden-Deauville Hotel, the property involved in Case No. 165 (R. 81, 82, 106, 136, 142, Case No. 165). In effect, however, the application for certiorari in Case No. 165, sought a review (Pet. 2, Case No. 165) of the decision rendered April 4, 1949, by the Court of Appeals, granting intervention to the petitioner only as of April 4, 1949, in the main litigation with the receivers of Deauville Corporation (Deauville Associates, Inc. vs. Eristavi-Tchitcherine, 173 F. (2nd) 745).

By its denial of petitioner's application for writ of certiorari in Case No. 165, this court has left in full force and effect the decision of the Circuit Court of Appeals upholding the actions of the receivers prior to April 4, 1949.

The property involved in the present proceeding is not the main hotel property involved in Case No. 165, but is merely the lessee's interest in a 99 year lease on what at the time of the receivers' sale, was a vacant lot (R. 10), a very small part of the assets of the corporation in receivership.

Pursuant to an order of the District Court dated April 30, 1948, ordering the sale of the leasehold interest to the highest bidder at public auction after published notice and direct notice to all parties to the litigation, the predecessor of your respondents became the purchasers of the lot, the purchase price becoming a part of the assets in the hands of the receivers (R. 19, 21, 40). On April 4, 1949, the Court of Appeals, by permitting petitioner's intervention only as of April 4, 1949, upheld the previous orders of the District Court to the receivers, including the order of April 30, 1948, directing the sale of the lot in question, leaving petitioner completely free to assert its alleged rights to "such fruits of the suit . . . as might otherwise have been awarded to their (assignors)". Deauville Associates, Inc. v. Eristavi-Tchitcherine, 173 F. (2nd) 745.

On April 13, 1949, the petitioner filed in the Circuit Court in and for Dade County, Florida, their complaint against your respondents, the subsequent removal of which to the United States District Court is attacked in this proceeding.

As aptly noted by the Circuit Court of Appeals, the complaint was thus filed ". . . nine days after the date fixed by this court for plaintiffs permitted intervention in the court below, (and) was brought to circumvent and nullify that determination by attempting to relitigate in the State Court matters which had been finally determined in the Federal Court". (Pet. 10).

The propriety and regularity of the sale by the receivers of the lot in question has thus been completely and finally determined adversely to the petitioner by the Circuit Court of Appeals and by this Court. Deauville Associates v. Eristavi-Tchitcherine, 173 F. (2nd) 745, petition for rehearing denied May 2, 1949, certiorari not applied for; Deauville Associates, Inc. v. Murrell, 180 F. (2nd) 275, certiorari denied Case No. 165, October Term, 1950.

It must necessarily follow, we submit, that the propriety and regularity of the purchase of the lot by your respondent's predecessors at the receivers' sale, as a matter of simple logic and justice, has been finally adjudicated by this court.

The petitioners themselves have apparently recognized the simple fact that a denial of their application for certiorari in the main receivership litigation, Case No. 165, would necessarily produce a denial of certiorari in the present proceeding.

At page five of their present petition, petitioners state that the present application was filed for the purpose of preserving any rights which might accrue to them by reason of a favorable adjudication in Case No. 165.

Case No. 165 having been decided adversely to petitioner by this Court, the present application for certiorari, it is respectfully submitted, should be automatically denied.

POINT II

PETITIONER'S SUIT IN THE STATE COURT WAS FOUNDED UPON AND RAISED A FEDERAL QUESTION AUTHORIZING ITS REMOVAL TO THE FEDERAL COURT.

The Circuit Court of Appeals in its decision (Pet. 12) held that "it is quite clear, upon the authorities" that a federal question was involved in the suit filed in the State Court, authorizing its removal to the Federal Court, citing South Dakota v. Continental, 255 Fed. 941, certiorari denied, 250 U. S. 642, 39 S. Ct. 493, "and cases cited".

The Court of Appeals for the Eighth Circuit, in South Dakota v. Continental, supra, stated clearly the governing principle:

> "As this is an action attacking a title to property acquired under a decree of a national court, upon the ground that the decree was coram non judice, there is a federal question involved, the action being dependent upon the original proceedings, under which title is claimed, and it was clearly removable upon that ground."

The case of Rand v. Walker, 117 U. S. 340, cited in petitioner's application in support of its argument against removability, is neither controlling nor persuasive. Rand v. Walker, supra, is, in point of time, a much earlier case

than South Dakota v. Continental, supra. The statement quoted by petitioner was merely obiter dicta, the case actually having been decided on the grounds of lack of diversity of citizenship. Moreover, in the instant case, either the petitioner or its alleged assignors were at all times parties to the federal proceeding under which respondent secured its title.

CONCLUSION

The petition for certiorari should be denied. Dated November 27, 1950.

Respectfully submitted,

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